Filed 12/12/19 P. v. Lopez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JOSE ALBERTO LOPEZ, Defendant and Appellant.	C087269 (Super. Ct. No. CRF173237)

Defendant Jose Alberto Lopez was convicted of making criminal threats against his former employer, dissuading a witness, and related offenses. He was sentenced to an aggregate term of five years in state prison. Following recall and resentencing, defendant's aggregate sentence was reduced to three years eight months.

Defendant appeals, arguing that Penal Code section 1001.36 requires us to conditionally reverse the judgment and remand for a mental health diversion eligibility

hearing.[1] We agree and shall conditionally reverse the judgment and remand for further proceedings under section 1001.36. We shall also remand for the trial court to recalculate defendant's custody credits. Finally, we shall strike a criminal protective order imposed on defendant pursuant to section 136.2 as unauthorized.

I. BACKGROUND

Defendant worked at the Green Zone Recycling Center in Woodland, where he was known as "Roberto Acosta." Defendant missed several weeks of work without explanation. When he returned, he was told that his continued employment was in doubt. Defendant responded to this news with a months-long campaign of harassing phone calls and text messages to Green Zone's owner and manager, Eric Jacobson, and his son, Robert, who is also a manager at Green Zone. Some of these communications were death threats. One text message, sent after defendant's threatening communications were reported to police, said, "I'm going to kill you, bitch. Call the DA again, I kill your familia."

Defendant was arrested and charged by information with dissuading a witness (§ 136.1, subd. (c)(1)—count 1), making criminal threats (§ 422—count 2), stalking (§ 646.9, subd. (a)—count 3), false personation (§ 529, subd. (a)(3)—count 4), and harassing by telephone (§ 653m, subd. (a)—count 5). A jury found defendant guilty as charged.

Defendant appeared for sentencing on May 31, 2018. In anticipation of the sentencing hearing, defense counsel submitted a statement in mitigation asserting that defendant, then age 41, was experiencing a "late onset of a major psychological disorder that will require extensive treatment." The statement in mitigation was accompanied by

---

[1] Undesignated statutory references are to the Penal Code.

the report of Dr. Donald R. Siggins, a defense-retained psychologist, who opined that defendant "may be developing a paranoid Schizophrenia Spectrum Disorder."

At the sentencing hearing, defense counsel argued for a lower term sentence, stating, "at least part of the motivation behind the conduct that [defendant] stands convicted of arises from a mental disease or defect that doesn't rise to the level of a defense." The trial court agreed that defendant's mental health challenges "played a part in all of the conduct here." The trial court sentenced defendant to an aggregate term of five years in state prison and awarded him 680 days of presentence custody credits. The trial court also ordered defendant to stay away from Eric and Robert Jacobson for 10 years pursuant to section 136.2.

A short time later, on August 3, 2018, the trial court granted the prosecution's request to recall defendant's sentence in light of *People v. Woodworth* (2016) 245 Cal.App.4th 1473 and resentenced defendant to an aggregate term of three years eight months in state prison. As before, the trial court awarded defendant 680 days of custody credits and ordered him to stay away from Eric and Robert Jacobson.

This appeal timely followed.

II. DISCUSSION

A. Mental Health Diversion

Defendant argues the judgment must be conditionally reversed and the matter remanded to the trial court to determine whether he qualifies for pretrial mental health diversion under section 1001.36. Effective June 27, 2018 (Stats. 2018, ch. 34, §§ 24, 37), section 1001.36 authorizes the trial court to grant "pretrial diversion" to defendants who suffer from qualifying mental disorders and meet other eligibility requirements.[2]

---

[2] Section 1001.36 became effective after defendant was sentenced on May 31, 2018, but before he was resentenced on August 3, 2018. (Stats. 2018, ch. 34, §§ 24, 37.) The parties do not discuss the forfeiture rule, which we would decline to apply in any event.

Defendant argues the new law applies retroactively to defendants, like himself, whose cases are not yet final. The People respond that section 1001.36 applies only prospectively to persons who were not tried, convicted, and sentenced before June 27, 2018.

Courts of Appeal are divided on the question of retroactivity, which is now pending before the Supreme Court. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted Dec. 27, 2018, S252220 (*Frahs*) [§ 1001.36 applies retroactively] and *People v. Weaver* (2019) 36 Cal.App.5th 1103, 1121, review granted Oct. 9, 2019, S257049 (*Weaver*) with *People v. Craine* (2019) 35 Cal.App.5th 744, 760, review granted Sept. 11, 2019, S256671 (*Craine*) [§ 1001.36 does not apply retroactively] and *People v. Torres* (2019) 39 Cal.App.5th 849, 855 [same].) Our Supreme Court will soon have the last word on the subject. In the meantime, we agree with the reasoning of *Frahs* and *Weaver* and conclude that section 1001.36 applies retroactively to cases, like defendant's, which were not final on appeal when the statute became effective on June 27, 2018.

To the extent that section 1001.36 applies retroactively, the People argue that remand would be futile because defendant has not made a sufficient showing of eligibility for mental health diversion. Specifically, the People argue that defendant has not been diagnosed with a qualifying mental illness by a mental health expert. According to the People, defendant has "nothing more than a doctor's note indicating that he '*may*

Although the trial court focused on defendant's mental health at the original sentencing hearing, before section 1001.36's effective date, neither the parties nor the court mentioned section 1001.36 at the resentencing hearing, after the new statute's hearing date. We infer from the absence of any reference to section 1001.36 that neither counsel nor the trial court was aware of the new statute at the time. Courts generally decline to apply the forfeiture rule to a right derived from recent, unanticipated changes in the law. (See *People v. Edwards* (2013) 57 Cal.4th 658, 705.)

be developing a paranoid Schizophrenia Spectrum Disorder,' " which, the People say, falls short of a "diagnosed mental disorder." We are not persuaded.

Section 1001.36 authorizes the trial court to grant pretrial mental health diversion if the following criteria are met: (1) the trial court is satisfied, based on evidence from a qualified mental health expert, that the defendant suffers from a recognized mental disorder as identified in the Diagnostic and Statistical Manual of Mental Disorders; (2) the trial court is satisfied the defendant's disorder played a significant role in the commission of the charged offense; (3) in the opinion of a qualified mental health expert, the defendant's mental health symptoms, which motivated criminal behavior, would respond to mental health treatment; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment for the disorder as a condition of diversion; and (6) the trial court is satisfied the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).) In *Frahs,* the court suggested that remand is appropriate when "the record affirmatively discloses that [the defendant] appears to meet at least one of the threshold requirements" of section 1001.36, subdivision (b)(1). (*Frahs, supra,* 27 Cal.App.5th at p. 791.) Following *Frahs,* we conclude that remand is appropriate here.

Although Dr. Siggins may have been equivocal as to whether defendant was currently suffering from a schizophrenia spectrum disorder or was merely at risk of developing one, his report leaves little doubt that defendant suffers from serious mental health challenges. Dr. Siggins' report, which was not prepared in anticipation of a mental health diversion eligibility hearing, indicates that defendant presents symptoms associated with a number of conditions identified in the Diagnostic and Statistical Manual

of Mental Disorders.[3] That these symptoms may fall short of a diagnosis of schizophrenia spectrum disorder does not mean that defendant does not suffer from another qualifying mental disorder. The trial court, which has already found that defendant's mental health challenges played a significant role in the commission of the charged offenses, is in the best position to make that determination. Accordingly, we shall conditionally reverse the judgment with directions for the trial court to consider defendant's eligibility for mental health diversion under section 1001.36. We express no view as to whether defendant will be able to show eligibility on remand or whether the trial court should exercise its discretion to grant diversion if it finds him eligible.

B. Custody Credits

As noted, the trial court awarded defendant 680 days of presentence custody credits at the time of the original sentencing hearing on May 31, 2018, and the same number of days of presentence custody credits at the time of the resentencing hearing on August 3, 2018. Defendant argues he is entitled to an additional 65 days of custody credit for the period from May 31, 2018, to August 3, 2018. The People concede the issue. We accept the concession and remand for recalculation of custody credits. (See § 2900.1; *People v. Buckhalter* (2001) 26 Cal.4th 20, 23, 37.)

C. Criminal Protective Order

As noted, the trial court ordered defendant to stay away from Eric and Robert Jacobson for 10 years pursuant to section 136.2. Defendant argues, and the People concede, that the criminal protective order was unauthorized. Again, we agree.

---

[3] In recognition of defendant's privacy interests, we do not include an extended discussion of Dr. Siggins' report. Based on our review, it is enough to note that Siggins' report supports a conclusion that defendant likely suffers from a qualifying mental disorder.

Section 136.2, subdivision (i) authorizes postconviction criminal protective orders only if the defendant has been convicted of certain specified crimes. Defendant was not convicted of any of those crimes. Therefore, the criminal protective order was unauthorized and must be stricken.

III. DISPOSITION

The judgment is conditionally reversed. The matter is remanded to the trial court with directions to hold a diversion eligibility hearing under section 1001.36. If the trial court finds defendant eligible under that statute, it may grant diversion. If defendant then satisfactorily performs in diversion, the trial court shall dismiss the charges. (§ 1001.36, subd. (e).) However, if the trial court does not grant diversion, or the court grants diversion but defendant fails to satisfactorily complete it (§ 1001.36, subd. (d)), then the court shall reinstate defendant's convictions and conduct further sentencing proceedings as appropriate. The trial court is further directed to recalculate defendant's custody credits consistent with this opinion, prepare an amended abstract of judgment, and forward a certified copy to the Department of Corrections and Rehabilitation. The criminal protective order is stricken. In all other respects, the judgment is affirmed.

/S/

RENNER, J.

I concur:

/S/

RAYE, P. J.

BUTZ, J., Concurring and Dissenting.

I concur in the majority's analysis in Parts B and C of the Discussion. (Maj. opn., *ante*, at pp. 6-7.) As to Part A, I dissent.

A jury convicted defendant in March 2018 of making criminal threats against his former employer, dissuading a witness, stalking, false personation, and harassing by telephone. (Maj. opn., *ante*, at p. 2.) On May 31, 2018, he was sentenced to an aggregate term of five years in state prison; the term was reduced to three years eight months on August 3, 2018.

Effective June 27, 2018, the Legislature created a "pretrial" diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (Pen. Code, § 1001.36.)[1] Defendant contends the judgment must be conditionally reversed and the matter remanded to the trial court to determine whether he is eligible for diversion under section 1001.36. In support of his contention, defendant relies on the retroactivity rules of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*). The majority agrees the statute operates retroactively and defendant is entitled to a conditional reversal to make his case for diversion. At first glance, the majority's position is appealing in light of defendant's presentation at sentencing that he might be developing a paranoid schizophrenia spectrum disorder and the trial court's acknowledgement that defendant had mental health "challenges" that "played a part" in his criminal conduct. Nevertheless, I respectfully disagree with the majority's conclusion that the statute is retroactive.

Courts are divided as to whether section 1001.36 applies retroactively to cases not yet final on appeal under *Estrada* and *Lara*. (Compare *People v. Frahs* (2018) 27

---

[1] Undesignated statutory references are to the Penal Code.

Cal.App.5th 784, review granted Dec. 27, 2018, S252220 (*Frahs*), *People v. Weir* (2019) 33 Cal.App.5th 868, review granted June 26, 2019, S255212, *People v. Weaver* (2019) 36 Cal.App.5th 1103, review granted Oct. 9, 2019, S257049, *People v. Burns* (2019) 38 Cal.App.5th 776, review granted Oct. 30, 2019, S257738, and *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted Nov. 26, 2019, S258541, with *People v. Craine* (2019) 35 Cal.App.5th 744, 749, review granted Sept. 11, 2019, S256671 (*Craine*), *People v. Torres* (2019) 39 Cal.App.5th 849, petn. for review pending, S258491 [time extended to Jan. 9, 2020] and *People v. Khan* (2019) 41 Cal.App.5th 460, petn. for review pending, S259498.)[2] I conclude, in agreement with *Craine*, that the statute does not have retroactive effect as to cases, like this one, that had already reached the stage of conviction (whether by jury or by plea) before the statute's effective date.

Section 1001.36 provides that a trial court, "[o]n an accusatory pleading alleging the commission of a misdemeanor or felony offense" (with exclusions not relevant here), may grant "pretrial diversion" to a defendant who meets all of the requirements specified in the statute. (§ 1001.36, subd. (a).) These include, among others, "a mental disorder . . . including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or [PTSD]," as established by "a recent diagnosis by a qualified mental health expert" (§ 1001.36, subd. (b)(1)(A)), and proof to the court's satisfaction that the mental disorder "was a significant factor in the commission of the charged offense" or "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).)

"Pretrial diversion" as used in the statute means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).)

---

[2] I may consider, as persuasive authority, the cases that have been granted review by our Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(1).)

Here, defendant was convicted and sentenced before the statute's effective date. The majority concludes that the statute applies to him because it should be given retroactive effect. In support of their position, the majority relies on *Frahs*. (Maj. opn., *ante*, at pp. 4-5.) For the reasons given in *Craine*, I conclude that *Frahs* was wrongly decided and the statute does not apply retroactively to persons, like defendant, "who have already been found guilty of the crimes for which they were charged." (*Craine, supra*, 35 Cal.App.5th at p. 754, rev. granted.)

The *Frahs* court decided whether section 1001.36 is retroactive by applying the standard retroactivity rules of *Estrada* and *Lara*. In *Estrada*, the court held that when the Legislature amends a criminal statute so as to lessen the punishment for the offense, it must be inferred that the Legislature's intent was to apply the lighter penalty to all cases not yet final. (*Estrada, supra*, 63 Cal.2d at pp. 745, 748.) In *Lara*, the court extended this rule to situations in which new legislation, though not lessening punishment, provides an " 'ameliorating benefit' " for accused persons or constitutes an " 'ameliorative change[] to the criminal law.' " (*Lara, supra*, 4 Cal.5th at pp. 308, 309.) Taking these rules together, *Frahs* found that section 1001.36 confers an " 'ameliorating benefit' " on a class of accused persons and therefore must be understood to work retroactively. (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, rev. granted.)[3]

---

[3] *Lara* summarizes *Estrada*'s holding as follows: " 'The *Estrada* rule rests on *an inference that, in the absence of contrary indications*, a legislative body *ordinarily* intends for ameliorative changes to the criminal law to extend as broadly as possible . . . .' " (*Lara, supra*, 4 Cal.5th at p. 308; italics added.) *Lara* then concludes that neither the language of the initiative under consideration (Proposition 57) nor the ballot materials rebutted the inference that the initiative was intended to apply retroactively. (*Lara*, at p. 309.)

In quoting *Lara*, the *Frahs* court omits the qualifying language we have italicized. Thus, *Frahs* in effect mischaracterizes the *Estrada/Lara* rule as one that applies automatically to all legislation conferring an "ameliorating benefit" on persons charged with crimes, regardless of any "contrary indications" (*Lara, supra*, 4 Cal.5th at p. 308) in

The *Frahs* court rejected the Attorney General's argument that by expressly restricting its scope to the "postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication" (§ 1001.36, subd. (c)), the statute set a temporal limit on its retroactive effect. (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev. granted.) The court reasoned: "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Ibid.*)[4] Concluding the issue could be resolved by applying *Estrada* and *Lara* to the plain language of the statute, the *Frahs* court denied the Attorney General's request for judicial notice of the statute's legislative history. (*Frahs, supra,* 27 Cal.App.5th at p. 789, fn. 2, rev. granted.)

In *Craine,* however, the court held that the *Frahs* analysis was flawed because it did not pay sufficient attention to how section 1001.36, subdivision (c), defines the timing of the "ameliorative benefit" it confers. In other words, *Frahs* did not properly consider either the phrase " 'postponement of prosecution' " or the phrase " 'until adjudication,' " instead relying only on a mechanical application of the *Estrada* and *Lara* rules. (*Craine, supra,* 35 Cal.App.5th at pp. 754-756, rev. granted.)

As to the phrase "until adjudication" (§ 1001.36, subd. (c)), *Craine* pointed out that " '[t]he purpose of [diversion] programs [in the criminal process] is precisely to *avoid* the necessity of a trial.' [Citation.]" (*Craine, supra,* 35 Cal.App.5th at p. 755, rev. granted.) In other words, absent clear statutory language showing otherwise, it makes no sense to say that a defendant can be given the benefit of "pretrial diversion" after a case

---

the legislation on its face or the legislative history (*Frahs, supra,* 27 Cal.App.5th at p. 790, rev. granted).

[4] *Frahs* did not address the first part of the statutory language quoted by the Attorney General (which is misstated as " ' "postponement *or* prosecution" ' "). (*Frahs, supra,* 27 Cal.App.5th at p. 791, italics added, rev. granted.)

has already gone through trial to conviction (or its equivalent, a guilty or no contest plea). (*Id*. at pp. 755-756.)

By the same token, the meaning of the phrase "the postponement of prosecution" (§ 1001.36, subd. (c)) depends on the normal usage of "prosecution" in the criminal process: " ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment. [Citations.]" ' " (*Craine, supra,* 35 Cal.App.5th at pp. 755-756, rev. granted.) "A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until . . . the accused is "brought to trial and punishment" or is acquitted.' " (*Id.* at p. 756.)

Therefore, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and sentenced. Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone." (*Craine, supra,* 35 Cal.App.5th at p. 756, rev. granted.)

According to *Craine*, *Lara* is distinguishable because the ameliorative benefit discussed there (the initial processing of accused juveniles in juvenile court, and trial in adult court only upon transfer) did not create a temporal bar to retroactive relief, as does section 1001.36. (*Craine, supra*, 35 Cal.App.5th at pp. 756-757, rev. granted.)

Craine also examines the legislative history of section 1001.36 (which *Frahs* refused to consider) and finds that it points to the same conclusion. The history makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly " 'to avoid unnecessary and unproductive costs of trial and incarceration.' " (*Craine, supra,* 35 Cal.App.5th at pp. 758-759, italics omitted [quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, pp. 2-3], rev. granted.)

As *Craine* points out: "Early intervention cannot be achieved after a defendant is tried, convicted, and sentenced. The costs of trial and incarceration have already been incurred. Moreover, because mental health diversion is generally only available for less

serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings. Since mental health services are already available to parolees . . . , it is hard to imagine the Legislature intended for additional court resources and public funds to be expended on 'pretrial diversion' assessments at such a late juncture." (*Craine, supra*, 35 Cal.App.5th at p. 759, fn. omitted, rev. granted.)

For all the reasons stated in *Craine*, I disagree with *Frahs* and find that "pretrial diversion" under section 1001.36 is not available to defendant because he has already been tried, convicted, and sentenced.

/S/

BUTZ, J.